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In the Supreme Court of the United States

OCTOBER TERM, 1987

JORGE A. GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Whether it was plain error to admit expert testimony that petitioner fit a psychological profile common to child molesters.

2. Whether petitioner is entitled to a new trial on the basis of hearsay allegations that the victim committed perjury.

3. Whether petitioner was denied the effective assistance of counsel.

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OPINIONS BELOW

The order of the Court of Military Appeals (Pet. App. 1a) is reported at 25 M.J. 159. The initial decision of the Air Force Court of Military Review (Pet. App. 2a-13a) is reported at 18 M.J. 716. A subsequent opinion of the Air Force Court of Military Review on remand (Pet. App. 14a-20a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 18, 1987. The petition for a writ of certiorari was filed on October 16, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Following a general court-martial before the military judge at Eglin Air Force Base in Florida, petitioner, a member of the United States Air Force, was convicted on two counts of committing lewd and lascivious acts on a

female under 16 years of age, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934. He was sentenced to six years' imprisonment, a dishonorable discharge, and ancillary punishments. The convening authority approved the sentence.[1] The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 2a-13a). The Court of Military Appeals granted review (21 M.J. 153 (1985)), vacated the judgment of the Air Force Court of Military Review, and remanded the case to that court (22 M.J. 192 (1986)). On remand, the Air Force Court of Military Review reaffirmed petitioner's conviction (Pet. App. 14a-20a). The Court of Military Appeals affirmed (*id.* at 1a).

1. On February 18, 1983, 11-year old Jennifer Arlen visited the dental clinic at Eglin Air Force Base for routine dental treatment (Tr. 40). At approximately 2 p.m., Jennifer was escorted to a room at the clinic to have her teeth cleaned by petitioner (Tr. 41). Petitioner told Jennifer to sit in the dental chair. He then adjusted the chair so that her feet were higher than her head, and he began to clean her teeth (Tr. 42). Jennifer later heard petitioner's pants unzip (Tr. 42, 50-51) and saw petitioner place a dark cloth on his lap (Tr. 42). Jennifer noticed that petitioner was quiet, but nervous and shaking (Tr. 43). Petitioner then told Jennifer to shut her eyes tightly, and he moved her head toward his lap. She tried to pull away, but petitioner moved her head back so that she could not move. He then told her to shut her eyes tightly. Just before she did, Jennifer Arlen saw petitioner move his penis

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[1] Petitioner had previously been punished for a similar offense the year before at a proceeding under Article 15 of the UCMJ, 10 U.S.C. 815 (PX 2, Tr. 164). That incident also occurred while petitioner was acting as a dental technician (PX 2).

towards her mouth (Tr. 43, 45, 50). A few seconds later, Jennifer felt it touch the side of her mouth before petitioner moved away. Petitioner then started "messing" in the corner (Tr. 43). Although Jennifer Arlen was afraid during the incident, she was unable to scream because she had dental equipment in her mouth (Tr. 43, 51). When Jennifer was preparing to leave, petitioner handed her an appointment slip. Jenifer pretended to read the appointment slip and saw that petitioner's pants were unzipped. She stared for a few seconds to make sure that she had not imagined the incident (Tr. 43).[2]

After leaving the room, Jennifer returned to her mother, who was waiting outside. A family friend who was also a dental technician, Sergeant Kay Kauffman, was standing with Jennifer's mother (Tr. 56). According to Sergeant Kauffman, Jennifer looked confused and scared (Tr. 56, 57). Jennifer looked back at petitioner's treatment room for three or four seconds, then looked at her mother and broke into tears (Tr. 57). According to Sergeant Kauffman, Jennifer mumbled to her mother that "[petitioner] kept forcing my head to the right and that his zipper was down" (Tr. 58).

2. The prosecution called a psychologist, Captain Bruce Ebert, to testify at trial. The trial court accepted Captain Ebert as an expert witness qualified in clinical psychology (Tr. 59, 60). Captain Ebert testified that he had administered a battery of psychological tests to petitioner and had also conducted several lengthy diagnostic

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[2] When recalled as a defense witness, Jennifer Arlen testified that she knew what a penis looked like and that she was positive that she saw petitioner's penis and not his finger (Tr. 99-100). On cross-examination by the prosecution, Jennifer added that when she saw petitioner's penis, it was protruding from his fly and his hands were behind her head (Tr. 100). As a prosecution witness, Jennifer had testified that petitioner's fingers were not near his penis, and that she was sure he was not wearing a glove or anything on his finger except a ring (Tr. 52).

interviews (Tr. 60-61a). Based upon those tests, Dr. Ebert gave an opinion as to how petitioner viewed himself and how he related to adult women (Tr. 62). He also gave an opinion that individuals who have some question about their own virility and feel that adult women are unapproachable in some way turn to children to express their sexual impulses (Tr. 62). In addition, Dr. Ebert testified that petitioner was trying to present himself in a favorable light (Tr. 63) and that petitioner had a test score on one scale that was consistent with a personality type that tends to be extremely defensive. He explained that persons with that personality type tend to rely on repression and denial as defense mechanisms, *i.e.*, they try to suppress conscious awareness of unacceptable impulses (Tr. 63). Based upon the tests and his interview with petitioner, Dr. Ebert concluded that petitioner's profile was fairly consistent with the profiles of individuals who in his experience molested children (Tr. 65).

The defense did not object to Dr. Ebert's testimony. On cross-examination, Dr. Ebert conceded that: (1) a person could take the same battery of tests as petitioner and fit within the profile of a sex offender, but never commit a sexual offense (Tr. 65); (2) the tests that he administered can prove absolutely nothing in terms of predicting a person's behavior, *i.e.*, whether he committed a certain act (Tr. 65); (3) the tests are not used for prediction in any manner, and are used only in research studies (Tr. 66); and (4) from the tests, Dr. Ebert could only descibe what is consistent and what is correlated, and could not describe a causal relationship (Tr. 66). Dr. Ebert further stated that having a psychological profile of a sex offender does not mean that a person will commit a sex offense (Tr. 66). In fact, Dr. Ebert testified that on one occasion he had administered tests to a self-confessed child molester, and the subject showed a normal psychological profile (Tr. 67).

On redirect examination, Dr. Ebert testified that, given his own investigation into petitioner's thought processes, he could not rule out the possibility that petitioner had committed the charged offense (Tr. 66). On further cross-examination, however, Dr. Ebert conceded that it is possible that his views on petitioner's personality test results were colored by his prior knowledge of the allegations in this case (Tr. 67). Dr. Ebert also acknowledged that he could never completely rule out the possibility that a person had committed a sex offense (Tr. 66-67).

The defense called several witnesses on petitioner's behalf to support the theory that Jennifer was mistaken as to what she saw.[3] Petitioner also testified in his own

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[3] Sergeant Kauffman was recalled as a defense witness and testified that she saw Jennifer in petitioner's chair at the time in question (Tr. 73). As a technician, she said she had on occasion moved a patient's head closer to her body and had also instructed patients to close their eyes when she was cleaning their teeth, that it was normal for petitioner to use a lap towel, and that petitioner would wear gloves when he cleaned the teeth of certain patients (Tr. 75). The defense also called Sergeant Reid, who testified that petitioner's movement of Jennifer's head, his use of a lap towel, gloves or a finger kot, and his request to a patient to shut her eyes tightly were all normal occurrences during a dental cleaning (Tr. 92). Sergeant Reid also said that the treatment room doors were usually left open while dental technicians were working (Tr. 95-96). Lavawne Dehart testified that between 2 p.m. and 2:30 p.m. on the day in question she went into petitioner's treatment room for a few seconds to deliver some paperwork and saw petitioner working on a female patient with brown hair (Tr. 84-85). She did not see petitioner's towel or the color of the patient's dress (Tr. 87), and she generally did not see anything out of the ordinary at any time while she was there (Tr. 85). A stipulation of expected testimony established that another dental technican, Sergeant Jeannette Turnage, glanced into petitioner's room at approximately 2:30 p.m. during Jennifer's appointment and saw nothing unusual (Tr. 88-89).

The co-workers also testified that there was a lot of traffic in the hallway outside of petitioner's room. On cross-examination of Sergeant Reid, the prosecution brought out that due to the appointment schedules, the traffic would be heavier on the quarter and half

defense and denied molesting Jennifer (Tr. 105). He testified that he normally used a lap towel during examinations and that he did so during Jennifer's examination, that he did ask her to close her eyes, that his door was open while he was examining Jennifer, and that he moved Jennifer's head toward his body to get access to her mouth (Tr. 102). He testified that these were normal procedures that he followed when cleaning teeth (Tr. 102). Petitioner said that he used a finger kot during Jennifer's appointment (Tr. 103; see Pet. App. 22a). Petitioner admitted that his pants were unzipped while Jennifer was in the room (Tr. 104). He explained, however, that he had gone to the bathroom just before her appointment, that he neglected to zip his pants afterwards, and that he did not discover that his pants were unzipped until he stood up and removed the towel from his lap after cleaning Jennifer's teeth (Tr. 110-111). On cross-examination, the prosecutor pointed out that petitioner did not offer that explanation when confronted by Mrs. Arlen on the day of the incident or to anyone else that day (Tr. 112, 113).

ARGUMENT

1. Petitioner argues (Pet. 8-19) that the trial court erred by allowing Dr. Ebert to give his opinion that petitioner fit the psychological profile of a child molester. The Court of Military Appeals agreed with petitioner on that point, ruling that Dr. Ebert should not have been permitted to state that conclusion (Pet. App. 1a). The court noted, however, that petitioner did not object to the testimony, and it held that the admission of that testimony did not amount to plain error (*ibid.*). For that reason, the propriety of the admission of Dr. Ebert's conclusion—to

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hour, as opposed to any other time in that corridor (Tr. 93). Additionally, because of the lap towel and the positioning of the dental couch, Sergeant Kauffman testified that she could not tell if petitioner's pants were unzipped (Tr. 78).

which petitioner devotes most of his petition (Pet. 8-18)—is not at issue here. Instead, the only issue presented by the admission of Dr. Ebert's testimony is whether the error in admitting his conclusion that petitioner fit the profile of a child molester is cognizable in spite of petitioner's failure to object at trial. That issue does not warrant review by this Court.

The court of military review correctly held that the admission of Dr. Ebert's conclusion did not have a substantial impact on the outcome of the case (Pet. App. 10a). As the court explained (*ibid.*), petitioner neutralized the damaging effect of Dr. Ebert's testimony on cross-examination. Dr. Ebert conceded that he could not conclude whether petitioner had committed the charged offense, and he conceded that the tests he had given petitioner did not predict or indicate the presence of aberrant sexual behavior. Moreover, although the prosecutor did refer to other aspects of Dr. Ebert's testimony during his closing argument, the prosecutor did not refer to the conclusion that petitioner challenges (Tr. 125-130, 143-147). Because Dr. Ebert's conclusion had little, if any, effect on the outcome of the case, the admission of that evidence did not result in a miscarriage of justice and thus was not cognizable as plain error.

2. Petitioner also claims (Pet. 19-20) that the military courts erred in denying his motion for a new trial on the basis of an affidavit alleging that Jennifer Arlen had stated that she had lied about the incident.[4] As the court of military review explained (Pet. App. 16a-18a), approximately a year after the trial petitioner submitted an affidavit prepared by Joan Seiler, who knew both Jennifer and Jennifer's mother. In the affidavit, Seiler stated that she had been told by her daughter that Jennifer had said that she had lied about the incident (*id.* at 23a). Jennifer

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[4] That claim was discussed by the court of military review on remand from the Court of Military Appeals (Pet. App. 16a-18a).

submitted an affidavit in response in which she said that she had told the truth at trial (*id.* at 17a).[5] The court of military review denied petitioner's motion for a new trial on the ground that Seiler's allegations were hearsay, that the allegations were contradicted by the sworn statement of Jennifer Arlen, and that Seiler made her allegations more than a year after the trial, even though Seiler was aware of the supposed misconduct prior to and during the trial (*id.* at 18a).[6]

Petitioner argues that the court of military review erred in ruling that the allegations were hearsay, but that argument lacks merit. Seiler's affidavit reported statements purportedly made by Jennifer Arlen to Seiler's daughter who, in turn, relayed the statements to Seiler. The evidence was therefore clearly hearsay—indeed, the affidavit's version of what Seiler's daughter said Jennifer Arlen said is triple hearsay. Petitioner's claim that Seiler's allegations were not hearsay since they were prior inconsistent statements by Jennifer Arlen and were admissible under Mil. R. Evid. 801(d)(1)(A) is mistaken. Under the rule, a prior inconsistent statement is nonhearsay only if it was

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[5] Seiler also alleged that Jennifer Arlen's mother has also said that she knew and was in contact with a member of the court-martial panel, that Mrs. Arlen knew what the panel was thinking, and that Mrs. Arlen could maintain the panel's sympathy through this person (Pet. App. 16a, 23a). In response, Mrs. Arlen and the court member alluded to by Seiler filed affidavits in which they denied any misconduct (*id.* at 16a-17a). After reviewing all the evidence on this issue, the court of military review found that the evidence indicated that nothing improper had occurred between any of the court members and Mrs. Arlen (*id.* at 17a). Petitioner does not challenge that conclusion in this Court.

[6] The Court of Military Review has the authority under Article 66(c), UCMJ, 10 U.S.C. 866(c), in considering the evidence to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."

made under oath in a prior judicial hearing or at a deposition, and the statements of Jennifer Arlen and Seiler's daughter were not made in such proceedings. In these circumstances, the court of military review properly held that petitioner's claim lacked a sufficient factual basis to justify further proceedings.

3. Petitioner also contends (Pet. 20-21) that he was denied the effective assistance of counsel because his attorney did not object to Dr. Ebert's testimony. As he presents it, that claim is not materially different from petitioner's claim that the admission of Dr. Ebert's testimony was plain error. Thus, even if defense counsel erred by failing to object to Dr. Ebert's testimony on direct examination, the error does not entitle petitioner to a new trial, because petitioner was able to neutralize any adverse impact of Dr. Ebert's testimony on cross-examination, as the court of military review found. See *Strickland* v. *Washington*, 466 U.S. 668 (1984) (requiring the defendant to establish prejudice before he is entitled to a new trial).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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